COMMENTS TO EOEEA AND THE JOINT COMMITTEE ON THE WIND ENERGY SITING REFORM ACT

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Summary: This bill has two negative impacts that are not justified by the need to address the climate crisis. First, the bill strips away home rule powers and vests in the Executive Office of Energy and Environmental Affairs authoritarian powers over energy development. Second, the bill's language aimed at protecting forests and natural resources which Massachusetts citizens have fought for centuries to protect, is meaningless and legally unenforceable, and as a result the bill will cause damage to these public resources.

EEOEA proposes the bill as a means to meet the goal of "2000 MW of Wind by 2020" – a slogan that DOER created out of whole cloth "because it sounds good." At a meeting of the Berkshire Regional Planning Commission, Municipal Government Committee in May, 2009, a member of BRPC asked DOER staff Mr. Kimmel and Mr. Clarke to explain the basis behind the "2000 MW of Wind by 2020" slogan: the answer was "it just sounded good," and there is no overall energy planning data or reports to support it. To ask the citizens of Massachusetts to dispose of 300 years of home rule and accept the destruction of natural resources so that EOEEA can rush forward to implement its slogan defies common sense.

Reliable reports show that the reductions in electricity use required by the Global Warming Solutions Act Energy goals can be addressed with conservation and efficiency and without construction of industrial scale wind turbines that this bill promotes. There is no need for the draconian measures set forth in this bill.

The bill fails to differentiate locally owned and operated turbines from projects promoted by the utility and venture capital industry seeking to locate in Massachusetts due to high REC prices and high electricity rates, which will sell electricity to the grid for distribution throughout the Northeast. Massachusetts citizens will be paying for industrial scale projects over which they have virtually no say, and will experience the destruction of natural resources on both state and private lands.

The damage that will be caused by this bill outweighs any benefits to curbing climate change and in fact exacerbates climate change by allowing the destruction of forests and ecosystems that are widely recognized for the role they play as carbon sinks in helping to slow climate change.

COMMENT AND ANALYSIS

SECTION 1

The proposal states that the purpose is to "streamline the permitting of such facilities at the state and local level and reduce delays associated with the appeals of such permits."

"Streamlining" eliminates meaningful public participation in the siting process. By truncating deadlines and eliminating important procedural processes set forth in otherwise applicable laws, the bill seeks to ensure that public participation in decisions to site wind turbines on state lands and private lands is essentially eliminated. This is particularly disturbing due to the fact that state forests and parks are held for public use and benefit and these lands are open to industrial scale wind development.

Eliminating a meaningful role for the public in the siting process is premature and unnecessary, given that EOEEA has not yet implemented the Green Communities mandate of ensuring all practicable conservation and efficiency measures prior to instituting industrial renewable projects such as the construction of wind turbines and associated transmission lines on public lands in Western Massachusetts. The pertinent part of the Green Communities Act states, at MGL c. 25, § 21: (a) To mitigate capacity and energy costs for all customers, the department shall ensure that, subject to subsection (c) of section 19, electric and natural gas resource needs shall first be met through all available energy efficiency and demand reduction resources that are cost effective or less expensive than supply. The cost of supply shall be determined by the department with consideration of the average cost of generation to all customer classes over the previous 24 months.

DOER should be required to implement all efficiency and demand reduction measures before allowing the irreversible destruction of forests and ecosystems that will be caused by siting wind turbines in the manner allowed under this bill.

SECTION 2 (g)

The one DOER employee to work with the Division of Green Communities "to provide technical assistance to municipalities with respect to the siting of wind energy facilities" is inadequate.

There are 351 municipalities in Massachusetts, and a large number are targeted as high wind sites, and assessing the impacts of turbine and transmission line siting, dealing with permitting issues, coordinating among various state and federal agencies is complex and time consuming. Providing one state employee to assist is mere tokenism. One wind project could easily consume one person full time for several years.

At a minimum, DOER should be required to provide documentation that one person is adequate to provide the technical assistance needed. Relevant data should include the amount of employee time dedicated by developers to siting and permitting a typical wind project.

SECTION 3

While the inclusion of the Commissioner of the Department of Fish and Game on the EFSB is encouraging, given the magnitude of environmental impacts from the Secretary's proposal for siting wind projects on state forest lands, the inclusion of DFG alone is not adequate to ensure proper representation of the public's interest in the values associated with state lands (scenic, recreational, etc.). Moreover, EOEEA has recently unlawfully begun to delegate to the EFSB its statutory responsibility under the Water Management Act to the EFSB, as occurred in the MEPA Certificate for the Westfield power plant. There, EOEEA unlawfully delegated to the EFSB its statutory authority to manage the water resources of the Commonwealth by directing the EFSB to determine the level of streamflow necessary to protect the ecosystem of the Manhan River. If EOEEA is going to continue to ask EFSB to do EOEEA's job, there should be additional environmental experts, including members of non-profit groups with expertise in environmental science, on the EFSB.

SECTION 6
This section of the Act amends Chapter 164 of the General Laws by adding four new sections: 69T, 69U, 69V, and 69W. The preamble to this section refers to three new sections (69T, 69U, and 69V), but, in fact, the Act contains a section 69W.

The bill covers all aspects of a wind facility, including roadways, transmission lines and distribution lines. *(Section 69V(a))* This includes the construction of public and private roadways, of new transmission lines across public and private property, buildings on and off the facility property or anything "whose primary purpose is to support the generation and delivery of electricity powered by wind." The broad sweep of this provision is not justified.

Within six months of the effective date of the Act, the Energy Facilities Siting Board must promulgate regulations setting standards. Wind facilities that comply shall be entitled to state and municipal fast-track permitting. "Fast track" state permitting raises a host of due process issues, and seriously reduces the opportunity for meaningful public participation in agency permitting decisions. EOEEA's current policies that "streamline permitting" and approval for renewable energy projects are causing substantial backlash throughout the Commonwealth. This should cause EOEEA to realize that its authoritarian approach to siting renewable energy projects does not have the support of the general public and indeed is undermining and working contrary to the goal of implementing renewable energy in the Commonwealth. For example, EOEEA's sidestepping of full environmental impact reports in the Greenfield and Springfield (Palmer Paving) biomass projects has caused a public backlash that is highlighting EOEEA's mismanagement and mishandling of the "green energy" issue. EOEEA's undermining of the MEPA environmental review process, combined with a wind siting bill that strips away local authority and streamlines permitting will cause further public dissention and undermine the purpose of the proposed bill.

EOEEA's policies, combined with this proposed bill, put communities at a significant disadvantage. The public and members of the local communities are already often

foreclosed from meaningful input and this proposed bill will put the public at a further disadvantage.

Under the bill, the EFSB "standards" must include "performance standards" to avoid impacts, "and to the extent impacts cannot be avoided, to minimize and mitigate impacts to scenic or recreational areas of ***special federal or state significance, designated habitats for plant and animal species listed pursuant to chapter 131A.****"*
The italicized bold language above has no legal meaning and no enforceability. First, there is no definition in the siting bill of what constitutes an area of "special federal or state significance." There is no other state or federal law defining an area of "special" federal or state significance and giving it legal protection.

The phrase "designated habitats for plant and animal species listed pursuant to chapter 131A" is similarly meaningless, because there are no such listed lands in Massachusetts. One need only look up 310 CMR 10.99 –to see that there are no listed "designated habitats." None have ever been listed, and it is unlikely any ever will be listed, due to the political sensitivity of implementing such a listing. Thus the language in the proposed bill is hollow, and provides no protection for the Commonwealth's natural resources.

Further, to expect that the state's NHESP program is able to protect "designated habitats" absent regulatory authority is unrealistic. Even if it could withstand the obvious political pressure imposed on the agency by Secretary Bowles in "renewable energy project" siting matters, the state's NHESP is chronically underfunded and understaffed. The report "Our Irreplaceable Heritage: Protecting Biodiversity in Massachusetts [Barbour, H., Simmons, T., Swain, P. and Woolsey, H., produced by NHESP and TNC, Second Printing 1999] states,

"…we can assume that the majority of rare species in the Berskhires are not adequately protected…."Protected open space in the Berkshires is disproportionately concentrated in higher elevations [wind sites], providing little protection for rare species and unprotected natural communities that occur mostly at lower elevations." P. 71. Little has changed since this report was published: NHESP is underfunded and the percent of lands with high biodiversity on wind sites in Western Massachusetts remains low. State forests are not managed for biodiversity.

Similarly, unless the "large unfragmented forest blocks" are off limits to wind turbines and transmission lines, they will no longer be "unfragmented."

The language in 69U on mitigation does not help an endangered species: once it is extinct its impossible to "restore or establish" "resources of equal value".

One example clearly documents the useless nature of the phrase "special federal or state significance, designated habitats for plant and animal species listed pursuant to chapter 131 A. First, is the Russell biomass incinerator"Renewable Energy" project. While Western Massachusetts has the Silvio Conte Wildlife Corridor, an area of "special federal significance", and "Wild and Scenic Desgination" on, for example, the Westfield River, it

has been proven that DEP ignores such designations of "significance" in its permitting decisions. See, Russell Biomass, OADR Docket No. 2008-118. Massachusetts' only federal land is the National Seashore Park and national historic sites, so other than that, there is no federal jurisdiction that would require heightened scrutiny, particularly in the Berkshires. Even in the National Seashore, there is no legally binding law that identifies "areas of special significance" leaving this designation to the whim of the EFSB in setting "performance standards." Similarly, areas of "state significance" has no legal enforceablility, and hence it is meaningless to include this language as if it provided some level of protection.

The bill allows for wind facilities on Article 97 lands once a plan identifying suitable and unsuitable lands has been issued by the EOEEA Secretary. (Section 69U), (See also Section 10) For the most part, this means all lands owned by the Department of Conservation & Recreation, and the Department of Fish & Game, including all state parks, forests, and wildlife management areas are open to industrial scale wind turbine siting.

The bill allows wind projects to impact scenic or recreational areas of special federal or state significance, priority and estimated habitats for plant and animal species listed under the state's endangered species act. It has been documented that bird and bat populations that are vulnerable to wind turbines. Large unfragmented habitat blocks, and wetland resources and other ecologically sensitive areas subject to protection by federal or state law will also be impacted. The bill requires performance standards to minimize and mitigate impacts if those cannot be avoided, but this is inadequate to provide the type of protection these resources need in order to further prevent their degradation. *(Section 69U) Wind turbines can be built along the boundary of the Appalachian Trail corridor, and within the habitats of rare and endangered species.*

Section 69U. The process for selecting members of the advisory committee does not ensure impartiality. There is no spot specifically designated for citizen advocates with expertise and experience in public lands and who represent Western Massachusetts in particular. It is clear from the Secretary's Wind Siting Report that EOEEA lacks sensitivity and depth of knowledge and experience with regard to the unique natural resources of the Western region of the state, including forests, viewsheds, and unique ecosystems.

Section 69V(c) After the municipal wind energy board renders a final decision, the applicant may file with the EFSB to demonstrate that the wind facility complies with the EFSB's siting standards. *The real purpose of this is that if a local board issues a permit with conditions that the* applicant doesn't like, the applicant can turn to the EFSB for a permit.

People outside the municipality where the wind facility is to be located cannot submit evidence. Wind turbines affect people outside the municipalities where they are constructed, yet those people will have no voice in the review, and no standing to appeal. Members of the public seeking to protect state forests and parks from intrusion by wind

turbines and transmission lines will have to show they are "substantially and specifically" affected by the hearing, which is a high legal standard to meet. It is doubtful that groups such as "Friends of Myles Standish State Forest" would be able to meet the legal standard of "substantially and specifically" affected. Moreover, this provision aims to ensure that unincorporated "citizen groups" are not able to enter evidence.

This provision conflicts with c. 214, § 7A, which authorizes an action to prevent damage to the environment when a law is being violated. Under 214, § 7A, a lawsuit can be brought by ten citizens of the Commonwealth; they do not have to reside in the municipality where the project is located. This provision is another attempt to foreclose citizen participation in the permitting process and is particularly offensive given the goal of the proposed law, which is to site turbines on state lands.

Section 69V(f) If the project meets the EFSB's siting standards, it must be approved by the EFSB. Even if the project doesn't meet the siting standards, the EFSB may approve it, regardless of any other law to the contrary. This means that the EFSB decision overrides any other law that would invalidate the permit or project.

Section 69V(g). If the EFSB approves the project, it is required only to adopt conditions for the approval recommended by state environmental agencies to the "maximum practicable extent." In other words, the EFSB can choose to ignore recommended conditions, and only has to explain in its written decision its reasons for not including those conditions. Here again, the language of "designated habitats" listed under 131A is meaningless. There are no designated habitats.

Section 69V(k) In this pivotal section of the proposed bill, the EFSB shall issue an approval if the facility complies as much as is practicable – however that is defined – but not absolutely with the standards. So, even if the project doesn't meet the siting standards, if the EFSB thinks it's close enough, then the EFSB must issue an approval. The EFSB can choose to ignore recommended conditions, and only has to explain in its written decision its reasons for not including those conditions.

Section 69(V)(l) provides that EFSB regulations governing procedures for permitting shall not require any data related to the necessity or cost of the proposed facility except for data related to the costs associated with mitigation, control, or reduction of environmental impacts. This shields the financial aspects of development proposals from public scrutiny. This provision raises significant legal concerns due to the fact that renewable energy development proposals such as wind are not financially viable without massive public subsidies, and are eligible for outright cash grants under federal programs such as the ARRA (stimulus bill). The Public Records Law and Federal Freedom of Information Act current give the public the right to obtain public records that contain information about federal and state tax credits, subsidies, loans, and grants to renewable energy projects. The proposed bill's attempt to prevent the public from obtaining these records appears to be inconsistent with state and federal law, and has no justification.

Section 69(V)(n) limits a judicial review to "party in interest aggrieved" and that review is in the state's supreme judicial court, an obvious attempt to intimidate citizens from seeking such review.

SECTION 7

This section of the Act adds a new section to the General Laws titled Chapter 40T: Wind Energy Permitting. It lays out the procedures for review and approval of facilities by the host municipality.

A municipality with significant wind resources as determined by DOER shall establish a wind energy permitting board. *(Chapter 40T, Section 1)* This imposes a heavy burden on municipalities; already relying on volunteer boards to do important zoning work. Given the complexity of environmental, legal, and societal issues involved in trying to site renewable energy projects, where does the expertise come from that will enable a municipal board to make these important decisions? Particularly when a transmission line or wind project may be on state land, or the wind project on state land needs a transmission line over private property in the municipality, does the municipal board have the expertise to oversee wetlands law, River Front protection laws, endangered species law, forestry law and so forth? Who funds the local wind energy permitting board? It is unreasonable to expect municipalities to bear the financial burden of administering and establishing yet another permitting program foisted on it by the state.

A proposal to develop a wind energy facility that complies with the EFSB's siting standards pursuant to section 69U of chapter 164 shall be eligible for fast-track permitting set forth in this section and section 69V of chapter 164. (Chapter 40T, Section 3(b)) Fast track permitting eliminates effective public participation in the democratic process. This is even more offensive when volunteer municipal boards are forced to administer a state program foisted on them, under a "fast track" process. Local zoning laws have their own deadlines that boards are familiar with and used to working under. The state should not be forcing down new timetables.

The project proponent files with the wind energy permitting board and the town or city clerk in lieu of separate applications to other local boards. (Chapter 40T, Section 3(c)) Various town boards, such as the Planning Board, ZBA, conservation commission, historic commission, etc., are denied the opportunity to implement their own zoning laws and programs. Instead, there is a town "wind czar board" that interprets the various town bylaws. The expertise and experience of the separate town boards ignored and eliminated, as the czar instead interprets and administers zoning laws that have been for decades administered by a range of boards. Eliminating the roles of separate boards will be inefficient, as each board has its expertise in the area of law under its jurisdiction. The current form of town government with several boards responsible for various components of the town's bylaws serves as a "check and balance" where different boards deliberate and weigh merits of a proposal. In a most offensive manner, this Act dispenses with that most democratic of processes, which is fundamental to the concept of local government in Massachusetts.

Even if the wind energy permitting board determines that the application is incomplete, once 30 days has passed from the local board's receipt of the application, the applicant can elect to go forward with the incomplete application. (Chapter 40T, Section 3(c)) The applicant is exempt from complying with the information requests of the local board because the proposed bill provides the reassurance that if the local board does not approve the project, or approves it with conditions that are unacceptable to the applicant, the applicant can file with the EFSB and seek approval even if the EFSB's siting standards are not met.

Unlike local zoning laws, where boards have to hold public hearing on permit applications, apparently under the proposed bill the town "wind czar" does not have to hold a public hearing. It only takes "recommendations" of local boards "as are deemed necessary or helpful". So, the recommendation of the ZBA or conservation commission can be ignored if the czar finds it is "not helpful." Section 40T3(d)

Under 40T3(e), the czar "shall have the authority to waive zoning and non-zoning requirements of the local laws, regulations, policies, or other regulatory requirements." Here, the bill gives the wind czar the authority to unilaterally re-write local zoning law by "waiving" zoning and non-zoning laws, regulations and policies. There are no standards that set boundaries on which laws, regulations and policies that can be "waived" by the czar.

As to the fees set under this section, there are no guidelines on the fee amounts, or use to which fees can be put. It is unrealistic to think that municipalities will be able to extract fees that are commensurate with the scope and duration of the negative impacts (e.g. thirty year life of a turbine) of a wind project.

Chapter 40T, Section 3(h). The local board is authorized to assess an impact fee upon the applicant in an amount set by DOER. It may accept other forms of mitigation in lieu of that impact fee. (Chapter 40T, Section 3(h)) The impact fee, limited by the schedule set by DOER, is the only financial benefit to the municipality that is guaranteed in this Act. This impact fee provision presumes that wind turbine impacts are only felt by the municipality. The general public has an interest in the aesthetic, scenic, and ecological value associated with public lands, vistas, views, quiet enjoyment of nature, etc., particularly with regard to state lands that are held in trust for all citizens of Massachusetts, not just those in the municipality where the turbine is located. How does the public get "mitigated" for the loss of these values?

Section 40T, Section 10. This section should explicitly say that a 2/3 vote of the legislature is needed for conversion of article 97 lands. There should be a public process with notice and comment to the RPA, municipality, in the Environmental Monitor, etc., notifying that a bill for conversion has been filed and public hearings should be held throughout the state.

Cc: Mark Robinson, Cape Cod Compact of Conservation Trusts
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